IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 145.

WILLIAM W. STEWART, APPELLANT,

vs.

LEWIS A. GRIFFITH, EXECUTOR, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

Statement of Case.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, reversing the decree of the lower court dismissing a bill for the specific performance of a contract for the sale of land in Maryland, and directing that a decree be entered, granting the prayers of the bill.

The bill, in substance, alleges as follows:

Plaintiff (appellee) brings suit as executor of the estate of Alfred W. Ball, deceased. On June 4, 1903, Ball, being seized in fee of the real estate described in the bill, and situate in Prince George's County, Maryland, entered into an agreement with appellee, appointing him agent and attorney to negotiate and sell the property. On June 5, 1903, appellee, under his power of attorney, and with the consent and approval of Ball, proceeded to effect a sale of the property, and

by a written contract between appellee and appellant sold the property to appellant for $40 per acre (the tract containing 240 acres, more or less), appellant agreeing to pay, and paying on said day, $500 as part of the purchase price, and agreeing to pay in cash the balance of one-half of the purchase price on or before November 7, 1903, and to give five equal promissory notes payable in one, two, three, four, and five years after said November 7, and representing the remaining half of the purchase price, to be secured by mortgage, and the deed from Ball to appellant to be executed and delivered when final payments should be made. The contract further provided that the land should be surveyed and the purchase price fixed at $40 an acre on the number of acres shown by the survey, the cost of survey to be borne equally by appellant and appellee; that the proper deed and abstract of title showing a clear and unencumbered fee-simple title should be made by one Roberts, an attorney of Maryland, who should act as attorney for both parties, and be paid a fee of $50, to be borne equally by both parties; that appellee, as agent for Ball, should have the privilege of forfeiting the $500 paid by appellant in case the balance of the first half of the purchase price should not be paid by the 7th day of November, 1903, and that Ball should be entitled to the possessory right to the land until appellant paid the balance of the first half of the purchase price. Ball assented to the contract and, subsequent to its execution, ratified and confirmed the same, and stood ready at all times prior to his death to convey a good, fee-simple title, free and clear of all liens and encumbrances to appellant, but appellant, while holding the contract of sale to be good and in force and paying one half the taxes on said land, at no time prior to Ball's death tendered himself ready and willing to perform the contract. The land was surveyed and found to contain 288.23 acres, and appellee paid the costs of survey. On November 6, 1903, Ball died, leaving a last will and testament, whereby he appointed appellee executor, with full and complete power and authority over decedent's real, personal, and

mixed estate. Appellee, under authority granted him December 15, 1903, by the orphans' court of Prince George's County, Maryland, in conformity with the laws of that State, tendered himself ready and willing to perform the things required of said Ball to be done under the contract of sale; furnished appellant an abstract of title as provided for and a certificate from Roberts that a deed from appellee would pass a good title; tendered appellant a deed of conveyance and a deed of mortgage to be executed by appellant securing balance of the purchase money; offered to let appellant into possession of the land, and demanded of him that he perform the things required to be performed by him under said contract of sale. Appellant refused to do any of the said required things, or to accept the tender of the deed in fee, to pay $5,273.00, representing the remainder of the first half of the total purchase price of the land; denied that appellee could convey a good, fee-simple title, clear and unencumbered, but expressed a willingness to perform his part of the contract if a good title could be conveyed to him; said that he did not consider the contract ended or the $500 forfeited, to which statement appellee agreed, and further said that he wished and was ready to carry out his contract provided a good title could be given him, and that he, appellant, was acting for an oil company in the matter, and appellee said he knew nothing of any oil company, and dealt with appellant and would look to him to keep his contract. Roberts made a further examination of title, and reported the same good, and that a deed from appellee would pass a good title to appellant. Appellee again tendered appellant a deed of conveyance and the latter refused to accept the same, and still refuses to carry out his contract. In February, 1904, appellee's attorney saw appellant's attorney, and informed the latter that the appellee could give a good title, and appellant's attorney replied that he did not believe that appellee could give a title, and that his client was willing to take the land whenever appellee could give a good title. Appellee is

ready and willing to perform all things required of him, and appellant refuses to carry out the contract. The prayer is for specific performance of the alleged contract. The bill has attached to it exhibits of the power of attorney, contract of sale, copy of the will of Ball, order of orphans' court, abstract of title and certificate, the deed tendered appellant, and mortgage to be executed by appellant.

The answer of appellant is, in substance, as follows:

Avers that appellee has no right to bring or maintain the bill as executor of Ball's estate; denies appellee's right as executor or otherwise to bring the suit or obtain a decree in his own right respecting the matters contained in the bill; avers that he, appellant, executed the option contract solely in behalf of the Maryland Oil and Development Company, of which he was president, and that Ball and appellee so knew at the time of the execution of the contract; that the money paid appellee was the money of said corporation; that appellant, to the knowledge of appellee and Ball, made said option contract in his, appellant's, name merely for convenience, and that said corporation is a necessary party; that said contract became null and void on November 7, 1903, both by the death of Ball and the terms of the contract; that the appellee regarded said contract as void, as on November 10, 1903, he declared the matter as ended, and before any attempted revival thereof the appellant acquiesced in said termination of the contract, and notified appellee that he, appellant, assumed no personal liability regarding the contract; he does not admit Ball's assent to or ratification of said alleged contract, and denies that he paid one-half the taxes on said land pursuant to any personal obligation; no survey was made until after Ball's death and after the contract had expired; admits the death of Ball, and alleges that the death of Ball terminated all interest and authority of appellee as his attorney, and the contract for the sale of the land became void and the same was not revived or made valid by any pretended verbal agreements set forth in the bill, and as to

all of which matters he pleads the statute of frauds as defense; does not know whether Ball made any will; does not admit the same and demands strict proof thereof; that if there be such a will as set forth in the bill, it, by its own terms, repudiated said contract of sale, and authorized the executor to sell decedent's real estate only at public sale after one month's notice by due publication; respecting the pretended proceedings in the orphans' court of Prince George's County, the appellant has no knowledge of the same, nor was he a party thereto nor did he consent to the same, and does not admit them nor their validity; that said court was without jurisdiction to ratify said alleged contract or to authorize complainant to execute the same, and was wholly without jurisdiction in the premises; denies that appellee ever tendered himself ready to perform said contract within the time fixed by the terms thereof; denies that he ever employed Roberts as his attorney or agreed to abide by his opinion respecting the title; denies that Roberts ever submitted to appellant an abstract, and alleges that he submitted the same to the attorney for the oil company, which did not show a good title; that appellee did not tender any deed sufficient to convey a fee-simple, unencumbered title; appellant after the death of Ball did not express a willingness to take the land; admits he declined to make the purchase and to pay appellee $5,273.00 in addition to the $500.00 paid, or to give his five notes for the remaining half; alleges that the appellee had no title which he could convey and the contract had been abandoned by mutual consent; the real buyer was the oil company; does not admit any willingness to perform the contract of sale, or that he ever expressed the opinion that the contract was in force or that the $500.00 had or had not been forfeited and demands strict proof; he never received any consideration for the making of any new contract, nor was the same ever expressed in writing, nor were the terms of the original optional agreement entered into by appellant as agent for said corporation ever waived,

modified or revived; appellant was acting for said company; he pleads the statute of frauds as to all the alleged considerations; all matters not specially answered are denied; admits that Thomas stated to appellee's attorney that appellee could not give a good title as executor or otherwise; denies that the pretended conversations created any contract; denies that Thomas was his attorney; pleads the statute of frauds to the whole bill; alleges that appellee, about two months before filing the bill herein, entered suit against appellant in Prince George's County, and that appellee has a plain, adequate and complete remedy at law, and should be required to elect whether he will proceed with the action at law or with this suit.

The evidence in the case is voluminous, much of it immaterial, incompetent and, of the oral testimony, conflicting. The documentary evidence is the power of attorney from Ball to the appellee, dated June 4, 1903, and is, in substance, as follows:

> "I, A. W. Ball, * * * do hereby constitute and appoint Dr. L. A. Griffith * * * to be my agent and attorney, for me and in my name to negotiate for the sale and transfer of my real estate in Prince George's County * * * said real estate containing 240 acres of land, for any sum he may be able to obtain, * * * not less however than the sum of $35 per acre, * * * all over and above $35 per acre the fee and commission to be paid to the said L. A. Griffith, for the services rendered me in obtaining a sale for the said property to be paid him out of the first payment to be paid for the property by the purchaser. I also agree to sign the contract in writing ratifying and approving of the sale to be made of the real estate, provided four hundred dollars be paid to me, it being also understood and agreed that the sale shall be consummated within 150 days from the date of signing contract of sale, by payment by the purchaser of the sum of one-half of the whole purchase money (and that one acre known as the

burying ground on said property is to be reserved forever to me and my heirs,) and that I am to have the use of the houses on said property and necessary wood until January 1, 1904" (Rec., 9).

The agreement of sale, signed by the appellant and the appellee as attorney for Ball and dated June 5, 1903, is, in substance, as follows:

> "That the said W. W. Stewart has paid to the said L. A. Griffith, agent, the sum of five hundred dollars ($500) part purchase price of the total sum to be paid for a certain tract of land owned by the said Alfred W. Ball, * * * Prince George's County Md. * * * (240 acres more or less), the same being sold at the rate of $40 per acre, which said sum of five hundred dollare is hereby acknowledged to have been paid to and received by the said L. A. Griffith, agent, and the said L. A. Griffith as the agent and duly authorized attorney of the said Alfred W. Ball, hereby grants, bargains and sells and agrees to convey by proper deed or deeds of conveyance in fee simple free and clear of all liens and encumbrances of every kind and nature duly executed by the said Ball to the said Stewart, the said two hundred and forty acres of land upon further payments and conditions hereinafter named to wit: * * * The balance of one-half of the purchase price of the said 240 acres more or less at the rate of forty dollars per acre is to be paid to the party of the first part on the 7th day of November 1903, and the remaining one-half of the total purchase price is to be divided into five equal payments. * * * And said party of the first part reserves therefrom a certain burial lot of one acre. * * *
>
> "The said land is to be surveyed and a plat made thereof and the total purchase price is to be at the rate of forty dollars per acre as determined by the said survey, the costs of said survey to be borne equally by the said parties of the first part and the second parts. Proper deed or deeds of conveyance and abstracts of title of the said land based upon title search therefor to be made by J. K. Roberts, attorney, * * * showing clear and unencumbered

> fee simple title, * * * and one-half of the total costs for same not exceeding $50 is to be borne equally by the parties hereto. *In case the remainder of the first half of the purchase price be not paid on November 7, 1903, then the said $500 so paid to the said Griffith is to be forfeited and the contract of sale and conveyance to be null and void and of no effect in law,* otherwise to be and remain in full force. * * * The said Ball is to have the right to continue to dwell and live in the house now occupied by him on the said land and to cut and use the necessary fire wood therefrom up to and until April 1, 1904, and the taxes for the year 1903 are to be paid one-half by the said Ball and one-half by the said Stewart. The possessory right to all of said premises on the property mentioned herein is to remain in the said Ball until the one-half payment of the total purchase price herein provided for on November 7, 1903, has been fully paid and satisfied, to the said L. A. Griffith, agent" (Rec., 321).

The following is a copy of the ratification of the above contract of sale by Ball (Rec., 80):

> "JUNE 19, 1903.
>
> "I, Alfred W. Ball, having received from my duly authorized agent and attorney, Dr. L. A. Griffith, the sum of four hundred dollars, do hereby ratify and confirm the sale made by him to W. W. Stewart of my real estate near Meadows, Pr. Geo. County, Md. This is with the understanding that if said sale is consummated and one-half the purchase money be paid cash that Dr. L. A. Griffith, my agent and attorney, shall pay out of his commissions one-half of the cost of surveying and attorney's fee—the other half by W. W. Stewart, otherwise I am to pay the costs of surveying and attorney's fees.
>
> "ALFRED W. BALL."

Ball died on the night of November 5 or the morning of November 6, 1903, and the contract of sale was to be complied with by a cash payment on November 7 or there was

to be a forfeiture of the $500 and the termination of the contract. The appellant did not make the cash payment of the first half of the purchase price before Ball's death, or at any time afterwards.

On November 7, 1903, the appellee wrote the appellant as follows:

> "UPPER MARLBORO, MD., *Nov.* 7, 1903.
>
> "W. W. STEWART, Esq., *Washington, D. C.*
>
> "MY DEAR SIR: I intended to be there today, but am unable to come. I met with an accident and so hurt my foot that I can wear no shoe. I may be able to get there on Monday but will let you know. If you prefer you can drive over today, or if not, I will telegraph to you Monday early, and if I cannot get there, you can take the 9.30 train here or drive here. I am sorry not to be able to get there, for I am anxious to close up the matter at the earliest date. If I cannot get there I may send Mr. Roberts, if you cannot come.
>
> "Yours very truly,
>
> "L. A. GRIFFITH" (Rec., 158).

The next written communication between the parties is as follows:

> "UPPER MARLBORO, MD., *Nov.* 10, 1903.
>
> "W. W. STEWART, Esq., *Washington, D. C.*
>
> "DEAR SIR: I have consulted two lawyers and am satisfied that I am fully authorized and empowered to complete sale of land and give deed. It rests with you. Please let me know positively on or before Monday next (16th) what you intend to do. There is a proposition on hand from other sources and I have under this will power to act. I will make private arrangements at once for a disposition of it, if you do not take it. If you do not meet the requirements and satisfactory arrangements are not made before Monday, 16th, at 12 o'clock please consider the matter ended. I think you are entitled to the property and I desire that you shall get it, but I

must do for the best interest of the estate, and I will gladly wait for you until Monday, 16th.

"Y's very truly, L. A. GRIFFITH.

"I have arranged to have the property surveyed at early date. This necessary in either case.

"G." (Rec., 162).

The appellant did not reply to this letter or take any steps to take advantage of its offer or to prevent the appellee's terminating the contract (Rec., 163).

On June 15, 1903, A. W. Thomas, attorney for the Maryland Oil Company, received from J. K. Roberts, appellee's attorney, and the person named in the contract of sale to make the abstract of title, the following bill:

"UPPER MARLBORO, MD., *June* 13, 1903.

"The Maryland Oil and Development Company, a Corporation, to Joseph K. Roberts, Attorney, D. C.

"To one half of the fees as agreed upon between the corporation and Dr. L. A. Griffith, agent of Mr. Alfred W. Ball, for professional services in the matter of the title and conveyance of the 240 acres more or less of a tract of land called 'The Child's Portion' and 'Crotch Hall,' near Meadows (Centerville), Prince George's County, Maryland, the other (½) one-half to be paid by Dr. Griffith, agent of Mr. Alfred W. Ball, $25,00" (Rec., 116).

The testimony in the record is undisputed that the appellant at the time of the making of the contract of sale was the president of the oil company, and that he was purchasing the land in question for said company (Rec., 87, 104, 105, 107, 108, 109, 113, 114, 118, 126, 127, 150, 153, 176, 181, 206, 207, 208, 220, 223, 251).

Whether the appellee and Ball knew that the appellant was buying the land for the oil company and not for himself is a disputed question. Testimony in the affirmative (Rec., 85, 87, 88, 89, 91, 99, 101, 113, 115, 121, 146, 151, 152,

154, 155, 164, 177, 178, 179, 188, 198, 212, 213, 218, 249); testimony in the negative (Rec., 50, 53, 54, 58, 62, 229, 235, 236, 241).

After the death of Ball, and after the appellee's letter to appellant notifying him that he should consider the matter ended unless complied with by a certain day, when the appellee sought to renew negotiations for the conveyance of the property upon the terms contained in the contract of sale of June 5, 1903, the testimony is uncontradicted that the appellee was informed and knew that the appellant had been acting for the oil company in making the contract of sale (Rec., 53, 56, 118, 119, 122, 143, 144, 161, 162, 164, 166, 200).

After the 7th of November, 1903, and before the 15th appellee testifies that he saw appellant, and the latter informed him that the property had been bought for the oil company (56), and appellee said that he would have nothing to do with the company but would deal with appellant. Appellant testifies that this interview was on November 9, 1903, and that he told appellee that he, appellant, had nothing to do with the matter, that the oil company was the party interested; that he would present the matter to the company and it could take any action it chose (161). And thereafter appellee wrote the above letter of November 10, declaring that unless the terms of the sale were complied with by the 16th of November, the appellant should consider the matter ended.

Subsequently, and after appellee, as he alleges, had caused the alleged will of Ball to be admitted to probate and an order passed by the orphans' court authorizing him to carry out the contract, he notified the appellant what he had done in the premises, and attempted to revive negotiations for carrying out the contract of sale. Appellant wrote appellee that the contract was entered into for and on behalf of the oil company, that he had no personal interest in the matter, and did not assume any personal liability regarding it. Ap-

pellee replied that he knew nothing about any company and would deal with appellant (164). Subsequently there were numerous interviews with reference to the matter, but appellant invariably claimed that he had nothing to do with the matter personally, that the oil company was the party to negotiate with. The testimony is contradictory as to what took place at these verbal interviews between appellant, the attorney for the company, and appellee and his attorneys. There is no writing of any kind in evidence showing that, after the forfeiture of the contract, appellant waived the forfeiture or renewed the contract or promised to take the property upon the terms of the contract, or otherwise.

The attorney for the oil company wrote the appellee's attorney, in substance, that he had examined the records of the proceedings in the orphans' court, and that it does not appear to him that the court had jurisdiction to make the order authorizing appellee to convey—that other steps would have to be taken to furnish the perfect and unquestioned title desired by the purchaser. That the agreement should stand pending the completion of title. That he had so advised the company, the real party to the agreement, Stewart being the nominal party only (Rec., 117). Thereafter an unexecuted deed, abstract of title, and mortgage to be executed by Stewart were presented to appellant and a demand made that he comply with the terms of the contract, which he declined to do, claiming that he was not personally interested in the matter; that appellee could not give a good title, that the heirs of Ball were necessary parties, and that the contract had been ended. There is conflicting testimony as to whether appellant promised to take the land upon a good title being conveyed to him; all this testimony is oral.

The appellee, under objection, offered in evidence a certified copy of the will of Alfred Ball (47). Copy of the will (13). Also offered in evidence, under objections, a certified copy of the order of the orphans' court authorizing the ap-

pellee, as executor, to carry out the contract (48). This order is as follows:

"In the Orphans' Court of Prince George's County, Maryland.

"*In re* The Estate of ALFRED WILMER BALL, Deceased.

"*Order of Court.*

"Upon petition of Lewis A. Griffith, executor of Alfred Wilmer Ball, filed in this court, the said Lewis A. Griffith, appearing as by the records of this court, doth show, to have duly probated the last will and testament of the said deceased and to have been named in the said last will, etc., as the executor of the last will and to have duly qualified as such executor, and further reciting the contract of sale made by the said Lewis A. Griffith, as attorney for the said Alfred Wilmer Ball under power of attorney, filed with the said petition, with a certain William W. Stewart, which said contract is filed also with the said petition, and that said contract by reason of the death of the said Alfred Wilmer Ball on the 6th day of November, 1903, the day before the contract was to be carried out, could not be carried out by the said Alfred Wilmer Ball, in his lifetime, and setting forth the fact that this court had power and authority in the premises to authorize him as such executor to carry out and fulfill the said contract with the said W. W. Stewart, and this court being of the opinion that it has such authority to so authorize him to carry out the said contract with the said W. W. Stewart:

"It is, thereupon, this 15th day of December, 1903, by the orphans' court of Prince George's County, upon consideration of said petition, adjudged and ordered, that the said Lewis A. Griffith, as executor of the said Alfred Wilmer Ball, be and he is hereby authorized further to execute a deed to the said Stewart conveying to him, the said Stewart, a good fee-simple title unencumbered of the said property

(real estate) of said Ball mentioned in same, upon the payment by the said Stewart of one-half of the entire purchase money less the $500.00 deposited, already paid, and the execution by the said Stewart of his five promissory notes, each for the one-fifth part of one-half of the entire purchase money of said land, payable to the order of the said Lewis A. Griffith, as executor, in one, two, three, four, and five years from date, with interest payable semi-annually, the same to be secured by a purchase money mortgage on said property as mentioned in the said agreement of sale" (Rec., 15).

Among the recitations contained in the unexecuted deed of conveyance tendered by appellee, as executor, to the appellant, is the following:

"And whereas the said court (orphans' court) did on the 17th day of November 1903, by its order passed on said date, authorize, direct and empower the said Lewis A. Griffith as executor to convey the said property to the said William W. Stewart, party of the second part, upon the payment of the residue of the unpaid installment of purchase money as agreed upon in the said agreement under seal, and the securing the payment of the deferred portion or instalments of the said purchase money, to wit, the one-half of the said total purchase money for the said land at forty dollars ($40) per acre, by the execution of the five promissory notes of the said William W. Stewart drawn to the order of the said Lewis A. Griffith, executor of the said Alfred Wilmer Ball, and payable in one, two, three, four, and five years from date with interest payable annually.

"And whereas the said Lewis A. Griffith as executor of the said Alfred Wilmer Ball deceased, for the purpose of complying with and carrying out the said order of the said orphans' court in the premises is willing to execute this indenture.

"Now this indenture witnesseth, that the said Lewis A. Griffith as executor of the last will and testament of the said Alfred Wilmer Ball, as aforesaid, for and in consideration of the premises as aforesaid, and the

> further consideration of the payment to him of the purchase money for the said land as agreed upon * * * and the execution by the said W. W. Stewart of the said mortgage on the said hereinafter mentioned land, securing the said five notes for the deferred payments of purchase money for said land, the said Lewis A. Griffith as executor of the last will and testament of Alfred Wilmer Ball, doth grant, release, confirm and convey unto the said William W. Stewart, his heirs and assigns forever in fee simple, all the following described real estate and premises" (Rec., 26-7).

In the abstract of title offered in evidence by the appellee it is set forth that the petition of the appellee asked the orphans' court to pass the above order of November 17, 1903, under the provisions of the Code of Maryland in such cases made and provided (Rec., 23).

The appellee did not offer in evidence or attempt to prove in the suit at bar, the record of the proceedings of the orphans' court of Prince George's County, in and by which the appellee claims he was appointed executor, and the will of Ball admitted to probate and record. Neither did he offer in evidence or attempt to prove the record of the proceedings in which the above order of November 17, 1903, was passed. The only part of the record of said proceedings in evidence herein is a certified copy of the order admitting the will to probate and a certified copy of the order authorizing the appellee to convey the property in accordance with the terms of the contract. The appellee did not offer in evidence any original or certified copy of any letters testamentary issued to him by the orphans' court of Prince George's County. There is conflicting testimony as to the meaning of the forfeiture clause of the said contract as understood by the appellant, appellee and the deceased Ball, to which attention will be called in the argument.

Upon consideration of the cause the equity court, on February 21, 1909, decreed specific performance of the contract (Rec., 329). Thereafter the appellant filed a motion to vacate the decree and for a rehearing, which was granted and the decree vacated (Rec., 367); and thereafter additional testimony was taken. Upon final hearing a final decree was passed dismissing the bill of complaint, for the reasons, in the opinion of the judge, that the heirs and devisees of the deceased Ball were indispensable parties to the cause, and that the deed tendered by the appellee was insufficient to pass title (Rec., 368). Upon appeal the Court of Appeals reversed the last-mentioned decree and directed that the prayers of the bill be granted. From this decree the appellant appeals to this court for its adjudication.

ASSIGNMENTS OF ERROR.

The Court of Appeals erred in reversing the decree of the equity court and directing specific performance, because:

1. *There is no proof in the record that the appellee is the duly qualified executor of the estate of Alfred W. Ball, deceased, and, as such, is entitled to bring this suit.*

2. *The record does not show that the orphans' court of Prince George's County, Maryland, had jurisdiction to admit the alleged will to probate or to grant letters testamentary to the appellee appointing him executor thereof.*

3. *The record shows that said orphans' court had no jurisdiction to pass the order of December 15, 1903, and that the same is a nullity.*

4. *The record does not show any existing contract which can be enforced by specific performance against the appellant, or any contract binding the appellant existing at the date either of the filing of the bill herein or of the said sup-*

posed orders of the said orphans' court of November 17 and December 15, 1903, or either.

5. *The record shows that the heirs of Alfred W. Ball are indispensable parties to this suit.*

6. *The record shows that the deed alleged to have been tendered the appellant by the appellee does not convey a good fee-simple title to the land involved free from all liens and encumbrances.*

7. *The case made by the record is not of that completeness as to justify the court in decreeing specific performance of the alleged contract.*

ARGUMENT.

I and II.

Assignments of error 1 and 2 will be considered together. The proof in the cause does not show that the appellee is the duly qualified executor of Ball, deceased, and entitled to sue in this District, and the record does not show that the orphans' court of Prince George's County had jurisdiction to admit the will to probate or to grant letters testamentary to the appellee.

The principle of law that an executor appointed in one State cannot sue or be sued as such in another State, unless the laws of the latter State authorize such suit, is so well established that no citation of authorities is needed.

After the passage of the Revised Statutes relating to the District of Columbia in 1875 and up to the enactment of the District Code in 1902 no foreign executor could sue or be sued in the courts of said District (Halstead *vs.* Wyman, 2 Mackey, 368; Plumb *vs.* Bateman, 2 App. D. C., 169; Noonan *vs.* Bradley, 9 Wall., 394; Fenwick *vs.* Sears, 1 Cranch, 259).

Section 329 of the District of Columbia Code provides:

> "It shall be lawful for any person * * * to whom letters testamentary * * * have been granted by the proper authority in any of the United States * * * to maintain any suit or action, and to prosecute and recover any claim in the District in the same manner as if the letters testamentary * * * had been granted to such person * * * by the proper authority in the said District; and the letters testamentary * * * or a copy thereof certified under the seal of the authority granting the same shall be sufficient evidence to prove the granting thereof, and that the person * * * hath * * * administration."

Then, in order for the appellee to maintain this suit, he must allege and prove that letters testamentary in the estate of Ball have been granted him by the proper authority of Prince George's County, Maryland. Nowhere in his bill does he make such allegation. The only allegations he makes are that he "brings this suit as the executor of the estate of Alfred Ball" (Rec., 1), and that "Ball died, leaving a last will and testament, whereby he appointed complainant his executor," etc. (Rec., 5). He makes no allegation that the proper authorities of Prince George's County had granted him letters testamentary. The introductory part of Complainant's Exhibit A[3], appearing to be a grant of letters testamentary, was not offered in evidence. The bill (Rec., 5, fol. 7) describes this exhibit as "a true copy of which last will *and the probate whereof.*" The answer denies the above-quoted allegations and demands strict proof thereof, as well as of the will (Rec., 39, 41). Nowhere in the evidence does the appellee offer in evidence letters testamentary or a certified copy thereof. The only offer he makes respecting the matter is, "I desire now to offer in evidence a certified copy of the will of Alfred W. Ball, deceased" (Rec., 47).

Now, what evidence was required of the appellee to prove

that the orphans' court of Prince George's County admitted the will to probate and granted him letters testamentary?

This inquiry involves a consideration of—

1. The nature and jurisdiction of the said orphans' court and the probative effect of its decrees when asserted as the foundation for relief in the courts of this District.

> "The orphans' court shall not under pretext of incidental power or constructive authority exercise any jurisdiction not expressly given by this act or some other law."
>
> Art. 93, sec. 256, p. 1398, Md. Code.

> "The orphans' court has no constructive powers. It has few of the attributes appertaining to courts of general jurisdiction. Its jurisdiction is limited and created by statute, and its exercise of power can receive no support from presumptions."
>
> Levering *vs.* Levering, 64 Md., 399.

It is a court of limited and special jurisdiction and is inhibited from the exercise of any power not given by statutory enactment.

Townsend *vs.* Brooke, 9 Gill, 91.
Broders *vs.* Thompson, 2 H. & G., 126.
Scott *vs.* Burch, 6 H. & G., 67.
Bowie *vs.* Shirelin, 30 Md., 553.
Taylor *vs.* Bruscup, 37 Md., 226.
Grant Coal Co. *vs.* Clary, 59 Md., 444.
State *vs.* Warren, 28 Md., 338.
Shafer *vs.* Shafer, 85 Md., 558.
Overby *vs.* Gordon, 13 App. D. C., 427.
Tuohy *vs.* Hanlon, 18 App. D. C., 230.
Yeaton *vs.* Lynn, 5 Pet., 224.
Kennedy *vs.* Sinnott, 179 U. S., 600.

Its mere exercise of jurisdiction does not raise a presumption of the existence of the requisite jurisdictional facts, for nothing is presumed to be within its jurisdiction.

Clark *vs.* Bryan, 16 Md., 171.

A party who relies upon its decisions or who claims any right or benefit under its proceedings must affirmatively show its jurisdiction in the premises by alleging and proving the same.

Boarman *vs.* Patterson, 1 Gill, 372.
Wickes *vs.* Caulk, 5 Harr. & J., 86.

A decree without or transcending its jurisdiction is void and may be attacked in a collateral proceeding.

Wilson *vs.* Ames, MacA. & M., 278.
In re Estate of McIntire, 5 Mackey, 293.
Cook *vs.* Speare, 13 App. D. C., 446.
Sinnott *vs.* Kennedy, 14 App. D. C., 1.
Fredwalt *vs.* Shepley, 74 Md., 230.

And generally with reference to courts of limited and special jurisdiction:

There is no presumption of law in favor of their jurisdiction; the facts which give jurisdiction must appear on the face of their proceedings; otherwise such proceedings are void; the person claiming the benefit of such proceedings must affirmatively show the jurisdiction; if the jurisdiction does not appear on the face of the proceedings the presumption of the law is that the court had no jurisdiction.

Kempe *vs.* Kennedy, 5 Cranch, 173.
Griffith *vs.* Frazier, 8 Cranch, 10.
Thatcher *vs.* Powell, 6 Wheat., 119.
McCormick *vs.* Sullivant, 10 Wheat., 192.
Ex parte Watkins, 3 Pet., 193.
Grignon *vs.* Astor, 2 How., 319.
Boswell's Lessee *vs.* Otis, 9 How., 348.
Harvey *vs.* Tyler, 2 Wall., 328.
Galpin *vs.* Page, 18 Wall., 350.
Hershberger *vs.* Blewitt, 55 Fed., 170.
Wickes *vs.* Caulk, 5 Harr. & J., 36.

2. The facts necessary to be presented to the orphans' court that it may have jurisdiction to admit a will to probate or to grant letters testamentary.

Sections 327, 328, and 329 of article 93, page 1420, the Maryland Code of 1888, declare what facts will give the orphans' court jurisdiction to admit a will to probate and record. They are, in substance, as follows:

If any will be exhibited for probate to the orphans' court and any of the next relations of the deceased shall attend and make no objections or enter no caveat, or if it shall appear that reasonable notice of the time of exhibiting the same hath been given to such of the next relations as might conveniently be therewith served and no person shall object or enter a caveat, the court shall forthwith proceed to take probate; or where such notice shall not appear to have been given the court may either direct summons to the said near relations, or some one or more, to appear on some fixed day to show cause wherefore the will should not be proved, or direct such notice to be given in the public papers or otherwise, as they may think proper, and if no objection shall be made or caveat entered on or before the day fixed, the court may take probate of such will.

Sections 41 and 50 of said article 93, pages 1327 and 1332, declare what facts shall give the court jurisdiction to grant letters testamentary. They are, in substance, as follows:

When any will shall have been proved as herein directed before the orphans' court, letters testamentary may forthwith be committed to the executor named in the will, provided he shall execute a bond to the State of Maryland, with two good sureties approved by the court, and in such penalty as the court may require; and after filing his bonds and before letters shall be committed to him, he shall take the oath that he will well and truly administer the estate.

The appellee has not introduced in evidence any record of the proceedings showing the existence of any of the above facts necessary to give the court jurisdiction; but, on the

contrary, the evidence in the case showing the circumstances attending the alleged probating of the will and granting of letters testamentary create the reasonable inference that some of the necessary facts had no existence.

The appellee testified:

> "After the death of Ball, I presented the will of Alfred Ball; had it probated by the orphans' court and got from them power to transfer this property to Dr. W. W. Stewart after having submitted to the orphans' court the contract of sale."

Also:

> "The regular sessions of the orphans' court are held on the first and third Tuesdays of each month" (Rec., 56).

Mr. Roberts, attorney for the appellee, testified:

> "I am familiar with the practice in Prince George's County and I think a couple of months would be a reasonable time within which to procure authority from the court for an executor to carry out a contract for the sale of real estate made by a decedent. I had a number of these cases and it sometimes took four or six months. The orphans' court met regularly only on the third Tuesday in each month and a special meeting on the first Tuesday" (Rec., 62).

W. R. Smith, the register of wills for Prince George's County, testified:

> "There was no petition for letters filed in the case by Dr. Griffith for his appointment; the court does not always require it" (Rec., 294).

The first Tuesday in November, 1903, occurred on November 3 (before the death of Ball), and the third Tuesday of that month occurred on the 17th, the day that the appellee claims that he presented the will to the court, had the same probated and obtained the order of the court authorizing him to carry out the contract of Ball. Between the date of

the death of Ball and this 17th day of November, 1903, there was no meeting of the court. It is quite evident that no notice was given to any of Ball's heirs of the proposed action of the appellee, as required by the statute. He was in such a hurry that he did not even file the usual petition for the probate of the will. It was as he testified; he merely presented the will and the contract and got the court to pass the several orders, one of which the appellee's attorney says it usually required several months to obtain. This action was wholly *ex parte* and did not give the court jurisdiction of the matter.

In case of Emmert *vs.* Stouffer (64 Md., 543) the testator devised real estate in such a manner that it devolved in a different way from what it would had she died intestate. The executors exhibited the will, alleging it was not the will of the testator, because she was mentally incapable of making it, and the court, after hearing the testimony of the subscribing witnesses and others, so decided and granted letters of administration. The question of the court's jurisdiction in the matter arose collaterally in a suit for specific performance. The court said:

> "The court has no jurisdiction in matters of probate except such as is conferred by the 93rd article of the Code."

After quoting the substance of the sections giving the orphans' court jurisdiction the court continues:

> "It is thus seen that great pains have been taken to afford to all persons interested, an opportunity to be heard before a determination is made against them. Two parties are contemplated as having a right to be heard; the one, which maintains the validity of the will by exhibiting it for probate; the other which comprehends all persons interested, who may desire to defeat and set it aside."

The court held that the orphans' court's decision was pronounced upon an application entirely *ex parte* and that it had no jurisdiction.

We submit that the appellee has no right to bring or maintain this suit, and that the alleged action of the orphans' court was without jurisdiction and void.

III.

The record shows that said orphans' court had no jurisdiction to pass the order of December 15, 1903, and that the same is a nullity.

This order was originally passed on November 17, 1903, but was amended by inserting the word "unencumbered" and, as amended, passed December 15, 1903 (Rec., 23). This order was offered in evidence, under objections (Rec., 48). There was no certified copy of the proceedings attending the making of said order showing the petition or other facts necessary to give the court jurisdiction to pass the same, and, under the decisions cited in the argument of the first and second assignments of error, it is a nullity. In addition, although the orphans' court may have had jurisdiction of the subject-matter of decedent's alleged contract and power to order the executor to carry out the contract and convey the property, yet if the record does not show facts which bring the contract within the scope of such power the court had no jurisdiction and its order is a nullity.

> "When a court exercises an extraordinary power under a special statute prescribing its course, we think that that course ought to be exactly observed, and those facts which give jurisdiction ought to appear in order to show that its proceedings are *coram judice*. Without the act of assembly the order for sale would have been totally void."
>
> Thatcher *vs.* Powell, Lessee, 6 Wheat., 119.
> Thompson *vs.* Whitman, 18 Wall., 457.
> United States *vs.* Walker, 109 U. S., 258.
> Windsor *vs.* McVeigh, 93 U. S., 274.

The only law of Maryland authorizing executors to carry out contracts of their testates and convey real estate in accordance therewith is contained in section 81, article 93, page 1342, of the Maryland Code. It is as follows:

> "The executor * * * of a person who shall have made sale of real estate, and have died before receiving the purchase money, or conveying the same, may convey said real estate to the purchaser, and his deed shall be good and valid in law, and shall convey all the right, title claim and interest of such deceased person in such real estate as effectually as the deed of the party so dying would have conveyed the same; provided, the executor * * * of the person so dying shall satisfy the orphans' court granting him administration that the purchaser has paid the full amount of the purchase money."

Now, before the orphans' court could obtain and exercise the power and jurisdiction to pass the said order of December 15, facts must have been presented to it showing: that Ball had died; that he had made a sale of the real estate involved; that he did not receive the purchase money or convey the property before his death; and that since his death the purchaser has paid the purchase money. The omission to show to the court any one of these prerequisites is fatal to its jurisdiction. In this case no one of these necessary facts is proved to have been shown to the orphans' court. The only evidence offered is the order itself, but, as we have shown, such order does not prove itself or the recitals therein. Without proof of the jurisdictional facts it is a mere nullity.

But suppose that the certified copy of the order is competent proof of its recitals, then, on its face, it shows the existence of such facts as determine conclusively that the orhpans' court had not the power or jurisdiction to pass the order.

The said order after reciting that the appellee filed a petition duly reciting the contract, the death of Ball, his not having carried out the contract before his death, and that

the orphans' court had power to authorize the appellee, as executor, to carry out the contract, provides:

> "That the said Lewis A. Griffith, as executor of the said Alfred Wilmer Ball, be and he is hereby authorized further to execute a deed to the said Stewart conveying to him the said Stewart a good fee-simple title unencumbered of the said property (real estate) of said Ball mentioned in the same, *upon the payment by the said Stewart of one-half of the entire purchase money less the $500 deposit, already paid, and the execution by the said Stewart of his five promissory notes each for one-fifth part of one-half of the entire purchase money of said land, payable to the order of the said Lewis A. Griffith, as executor, in one, two, three, four, and five years from date, with interest payable semi-annually, the same to be secured by the purchase-money mortgage on said property as mentioned in the said agreement of sale.*"

The statute says, that the court may make the order when the executor satisfies it that the purchaser has paid the full amount; the order says the court is not so satisfied but is informed that the money has not been paid. This order is clearly a nullity. This section of the Maryland Code only intended that the executor, through the order of the court, should be a mere medium of conveying the legal title, where the purchaser had paid the purchase price and a deed of conveyance was the only thing necessary to complete the performance of the contract. It was made for the benefit of the purchaser. It did not intend that the orphans' court should decide any conflicts or differences between the executor or heirs or devisees and the purchaser; it did not empower the orphans' court to compel specific performance; or determine when or in what manner a purchaser should pay the purchase price, or that he should pay the purchase price. Before the court could take jurisdiction all these matters must have been settled between the executor, or heirs or devisees of the testate and the purchaser. And, in addition

to the other infirmities in the proceeding, the record does not show, and it is not contended, that any heir of Ball was before the orphans' court on the executor's petition, or had any notice or knowledge thereof.

The orphans' courts have power to take probate of wills but not to adjudicate questions of title dependent upon their operation or effect, or to decide upon the rights of disposition. When probate is granted the authority to determine what passes under the will is devolved upon the courts of law and equity. They cannot establish any right that may arise under the will by construction of the will.

Schull *vs.* Murray, 32 Md., 9.
Ramsay *vs.* Welby, 63 Md., 584.

The deed alleged to have been tendered by the appellee to the appellant as a good and sufficient deed to convey a fee-simple title, recites that the authority of the grantor therein is based upon this order of the orphans' court.

In the case of Grant Coal Company *vs.* Clary (59 Md., 445), where a construction of this section of the Maryland Code was involved, the court said:

> "Orphans' courts in this state exercise a special and limited jurisdiction expressly conferred by statute, and the Act of 1846, neither in terms nor by implication confers jurisdiction upon such courts, to hear and determine controversies in regard to the sales of real estate by testators or intestates. It merely authorized executors and administrators to convey real estate, sold by testators, provided they satisfy the orphans' court that the purchase money has been paid. Satisfactory proof of such payment, *is a condition precedent to the exercise of the power.*"

And the court held that the order of the orphans' court, where it was not shown that the purchase money had been paid, was no bar to recovery of the land by the heirs of the testator in an action of ejectment.

And in the case of Baltimore *vs.* Hood, 62 Md., 378, the court said:

> "When a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing. * * * A void proceeding is so entirely vitiated as to be incapable of amendment. It has no effect whatever. Being absolutely null and void no person can justify under it."

IV.

The record does not show any existing contract which can be enforced by specific performance against the appellant, or any contract binding the appellant existing after November 7, 1903.

The contract of which specific performance is sought and which is quoted in the above statement of the case, after reciting the sale of the property, the terms, etc., provides:

> "In case the remainder of the first half of the purchase price be not paid on November 7, 1903, then the said $500 so paid to the said Griffith, is to be forfeited and the contract of sale and conveyance to be null and void and of no effect in law otherwise to be and remain in full force" (Rec., 322).

The Court of Appeals held that this was not an "option contract" and, therefore, notwithstanding its terms, and the fact that appellant failed to pay the purchase money at the time mentioned and abandoned his rights under the contract, the same continued in existence and might be enforced by the appellee. That the appellee had an option but the appellant had not.

Now, we submit, that it is of no material importance that a contract be called an option contract, a contingent contract, a self-terminating contract, or what not; the court is not controlled by any such designation, but by the intention and

meaning of the parties to be gathered from the terms of the contract. As this court said:

> "The question always is, What did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out."
>
> U. S. *vs.* Bethlehem Steel Co., 205 U. S., 119.

The language used is that in case the appellant should not make the first payment at the time specified then the $500 deposited at the time of the execution of the contract should "be forfeited and the contract of sale and conveyance to be null and void and of no effect in law."

Nowhere does the contract provide that either the appellee or appellant shall have the option to consider the contract continuing, and enforce the same after the happening of the contingency, which the contract itself says shall terminate its own existence.

This contract being a Maryland contract, affecting lands in that State, must, of course, be construed and its meaning determined in accordance with the decisions of the courts and the laws of that State.

Now, what is the meaning of null and void and no effect in law? Words used in a contract must be given their ordinary meaning, and if technical words their technical meaning. The words "null and void" are technical words having a technical meaning, which is not different from the ordinary meaning, unless the context shows that the intention of the parties was that the primary technical, as well as ordinary, meaning should not be given to the words. In some cases where it is shown that the stipulation avoiding the contract is inserted for the sole benefit of one of the parties then the word "void" is considered to mean voidable. As in the case of landlord and tenant, where the lease provides that in the event the tenant shall fail to keep some of his covenants the lease shall become void—in such case, so far as the landlord, is concerned, it is voidable only. In a few States—for

instance California—where a contract for the sale of land provides that if the vendee fails to comply with his contract the deposit shall be forfeited and the contract become void, the courts hold that the word void means voidable and that the vendor has the right to enforce the contract upon default of the vendee. But we think an examination of the cases arising in those States will show that the language avoiding the contracts under construction therein is different from that contained in the present contract; but, if not, the decisions of those States do not control the construction of the contract under consideration.

It is sometimes said that the words "null and void" are synonymous, and for the purposes of this argument they may be so considered.

Now, the primary technical, as well as ordinary, meaning of the words is, without legal effect or force, incapable to bind parties or support a right.

29 Amer. & Eng. Ency. L. (2d ed.), 525.

And this meaning should be given to the terms of avoidance used in the present contract unless the context shows that a different meaning was intended. We cannot find that the contract discloses any such intention. There was no change in the position of the parties, except that the vendee gave up $500 and the vendor was prevented from selling his land to any one else until the time of the contingency arrived. The vendor retained possession of the land and the vendee had no control over it whatever. There was no option beyond the date of the contingency given to either party and it is not apparent why "void" should be held to be "voidable." But the contract itself shows that the parties did not intend the result of the happening of the contingence to make the contract merely voidable, because they use not only the term "null and void," but added to it the term "and of no effect in law." This latter term must have had some meaning in the minds of the parties, as it has had in the minds of this court. In the case of the

Pullman Palace Car Co. *vs.* Central Trans. Co., 139 U. S., 24, the meaning of the word "void" came under discussion. It was contended that it meant "voidable" only, and the court, to emphasize the meaning of the word void, intended as an absolute nullity, said, "It is not voidable only, *but void and of no legal effect.*" And the parties to the contract in this case, in order to show their intentions as to the avoidance of the contract, said it is not "null and void" only, but of "no effect in law."

That this was the understanding and intention of the vendor is strongly shown by the terms of his ratification of the said contract. By the provisions of the latter the appellant and the appellee, who was acting for the vendor on commissions, were obligated to each pay one-half of the costs of the survey of the land. Appellee was to pay his half out of his commissions and the appellant was to pay his half as an addition to the purchase price of the land.

Now, when the contract was submitted to the owner of the land for ratification what did he say? This:

> "I, Alfred W. Ball, * * * do hereby ratify and confirm the sale made by him (Griffith) to W. W. Stewart of my real estate near the Meadows, Pr. Geo. County, Md. This is with the understanding that if said sale is consummated and one-half of the purchase money be paid in cash, that Dr. L. A. Griffith my agent and attorney, shall pay out of his commissions one-half the cost of surveying and attorney's fee, the other half by W. W. Stewart, otherwise I am to pay the cost of surveying and attorney's fees." (Rec., 80).

Now, this, we submit, is conclusive proof that the vendor contemplated that the sale might not be consummated, and in that event, not only was the contract to terminate and the appellant to be relieved from any further obligations under the contract, but he, Ball, was also willing, and so stipulated, to relieve the appellant from paying one-half the costs

of the survey. He would be so satisfied with the forfeiture of the $500 and the retaining of his land, that he thought it right that appellant should not be compelled to pay one-half of said costs, which the latter might be compelled to do even though the contract should terminate. There is nothing in the context of this contract to show that the terms of avoidance used therein mean voidable and not absolute void.

In the case of Cherry *vs.* Stein, 11 Md., 1, the meaning of the terms of avoidance of a contract for the sale of real estate came before the court for determination. The contract begins by saying, "I have this day purchased from C. R. Tate, administrator," and concludes with "this sale to be null and void in case the whole square, as advertised, shall be sold together, otherwise to remain in full force." The court said: "Such an instrument constitutes a valid and effective sale, subject to become a nullity upon a single contingency."

And the Court of Appeals, in its opinion in the present case, to substantiate its holding that the contract in question is not an "option" contract and did not terminate upon the default of the appellant in making his payment, but continued in existence at the election and for the benefit of the vendor, refers to and quotes from the case of Hazelton *vs.* Le Duc, 10 App. D. C., 379. That case instead of supporting the court's contention refutes it, and shows the different construction to be placed upon a contract of sale which provides for the forfeiture of the deposit merely, and one which, providing for the forfeiture, also declares that the contract shall become null and void. In that case the language of the contract was, "terms of sale to be complied with in fifteen days or deposit hereby made will be forfeited." In commenting upon these terms the court construing the same said: "The only construction that can reasonably be put upon this language is that the parties intended and understood that there was a present sale * * * these words not an option of purchase, they were inserted for the benefit

of vendor * * * it gave him an option of treating it as void and retaining the two hundred dollars." And then to show that said construction did not conflict with the court's decision in the previous case of Jones *vs.* Holliday, 2 App. D. C., 279, wherein the contract was held to be an option, and referring to the latter contract, the court said: "Because the provisions of the contract were positive and unqualified that upon failure of the vendee to comply with the terms of sale, the contract was to be null and void."

We submit that there can be no doubt as to the meaning of the avoiding clause of the contract, and that when the contingency happened the contract terminated and has since had no existence.

But if there should be any doubt, then the conduct and conversations of the parties and their agents maintain our contention.

> Where there is a doubt as to the meaning of a contract, the construction put upon it by the parties themselves is entitled to consideration. And the court will look to the language employed, the subject-matter and the surrounding circumstances and evidence of these matters is admissible.
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> Varnun *vs.* Thurston, 17 Md., 471.
> Roberts *vs.* Bonaparte, 73 Md., 191.
> U. S. *vs.* Bethlehem Steel Co., 205 U. S., 118.

And the acts and declarations of agents of the parties in the course of their employment are admissible.

Main *vs.* Aukum, 12 App. D. C., 375.

The appellant testified, "I stated to Dr. Griffith that we would like to get a lease. He said he was afraid the Balls would not lease. Then I suggested, 'Doctor, couldn't we get an option on the land, paying down $250 and making the time six months?' He said he did not know whether that could be perfected or not, but that if we paid $500 down we might get an option" (Rec., 151). Leapley testified that ap-

pellant wanted an option and the parties settled on $500 (Rec., 88). The appellee testified that he and appellant had talked about an option, "that is, whether he could pay so much with the right of forfeiture. I had objected to anything of the sort" (Rec., 92). Roberts, appellee's attorney, testified that the first agreement which was signed by Thomas and Griffith was drawn up by Thomas. "It was understood that there was to be a further agreement which I was to draw. I did" (Rec., 61). In the agreement drawn by Thomas the forfeiture clause was: "is to be forfeited, and the contract of sale and conveyance to be null and void and of no effect" (Rec., 12). In the agreement drawn by Roberts he wrote "null and void and of no effect *in law.*" (Rec., 322), thus showing that his particular attention was given to this clause, and, being a lawyer, he must have construed its meaning to be, and so informed his client, the same as he construed the meaning of another contract of sale for a portion of this very land which his client had entered into with other parties. In the abstract of title furnished by him he refers to this latter contract as follows: "This agreement was dated March 11, 1902, and was to be of no effect and virtue if the parties failed to pay for the same (the land) within 6 months from March 11, 1902, which Mr. Ball says they did not do, so if that be correct and it must be so, the said contract is of no virtue in law" (Rec., 119).

That was his opinion of the meaning of such terms expressed five days after the making of the contract in suit. He further testifies that after Thomas had drawn up the contract he was called in by Dr. Griffith and went over the contract with Griffith and Thomas and told them it was all right (Rec., 61). Griffith further testifies that at the time of signing the contract he asked Thomas what he meant "by this in here—$500 if not paid"—and Thomas said, "If he had another offer for the property and Dr. Stewart refused to comply with his terms that I could have an option and I could force him or I could make him forfeit the $500"

(Rec., 49-50). Thomas denies the truth of this statement and says, "I simply said that meant that if the money was not paid on the 7th of November, the $500 would be forfeited; that the whole matter was a gamble" (Rec., 114). Flynn testified that Ball told him that he had sold the land to the oil company and a certain amount had been paid him, and that if they did not pay the balance on a certain day he would consider it no sale (Rec., 212). Ferguson testified that Ball told him that if the company didn't settle on the 7th of November he would not give them three minutes after that day (Rec., 213). Harrison testified that Ball said that if the purchaser did not take the land he had the $500 (Rec., 117). Branson testified that Ball told him that he had sold the land to the company on a payment of $500, and the balance was to be paid at a certain time, and unless it was they forfeited the $500 and the contract became void (Rec., 218). Appellant testified that when the contract was presented to him for signature "I looked at the option part of it and saw it was there and it seemed all right to me. * * * Then I signed the contract" (Rec., 155).

So that it is quite certain that all these parties in interest understood that if the first payment was not made on November 7 the contract would become void and ended. It is immaterial whether it be called an option or anything else; the facts remain that Ball and appellant and the agents understood that upon the appellant's default Ball should keep his land freed from the contract and put the $500 in his pocket and do what he pleased with it, except that he was to relieve the appellant from paying one-half of the costs of the survey and attorney's fees. In the case of Cathcart vs. Robinson (5 Pet., 264), wherein a bill for the specific performance of a contract to purchase land was filed by the vendor against the vendee, who had refused to comply with the terms of his contract, it appears that the terms of the

contract show an absolute, unqualified purchase and sale; no provision for forfeiture or that upon the vendee's failure to make the prescribed payments the contract should become null and void. It contained the following provision: "In further confirmation of the said agreement the parties bind themselves each to the other in the penal sum of one thousand dollars." The vendee contended that this provision was understood by the parties to mean that in case the vendee defaulted the payment of the penalty satisfied the contract and put an end to it, so that the vendor would not thereafter have the right to enforce the contract. The vendor contended that the default and payment of the penalty did not terminate the existence of the contract. Testimony dehors the contract was taken to show the intentions of the parties, and the court admitted and considered the same and held that as the evidence showed that the understanding was that the penalty was to be accepted in full satisfaction of the contract should either party default the court would decline to decree specific performance.

But for the purpose of argument assume that the contract was not self-terminating—that Ball had the option to say whether he would or not enforce the contract after the 7th of November—that such option devolved upon the appellee, as executor, then we submit that the letter of the appellee to the appellant of November 10 terminated that option and the contract. In that letter he says: "I have consulted two lawyers and am satisfied that I am fully authorized * * * to complete the sale. * * * If you do not meet the requirements and satisfactory arrangements are not made before Monday, the 16th, at 12 o'clock, consider the matter ended." In response to this nothing was done by appellant

To avoid the effect of this ending of the alleged optional right the appellee contends that as he had not then received his letters testamentary his action was without authority and not binding upon him.

Section 48, art. 93, of the Maryland Code provides:

> "No executor named in a will shall, before letters testamentary be granted to him, have any power to dispose of any part of the estate of the deceased, or to interfere therewith further than is necessary to collect and preserve the same; but any act of an executor named in a will done before obtaining letters testamentary shall, in case he shall afterwards obtain such letters be as valid and effectual as if said act had been done after obtaining such letters."

The appellee in his bill alleges that after the death of Ball and the termination of the contract further negotiations were had with the appellant looking to a carrying out of the contract, and that the appellant disclaimed that he desired any forfeiture of the same and expressed a willingness to take the land and pay for it in accordance with the terms of said contract, provided the appellee could convey a good title. The appellant in his answer denies these allegations and pleads the statute of frauds as a defense to all these alleged verbal transactions; and further avers that in all the conversations between himself and the appellee, the latter was distinctly informed that he, appellant, had been and was then acting for the oil company and not for himself, and that if any purchase of the land should be thereafter made it would be for said company and not for himself (Rec., 43).

We have heretofore, in the statement of facts, called attention to the contradictory testimony in the record as to whether the appellee or his principal, Ball, knew, at the time of the execution of the contract on June 6, 1903, that the appellant was acting in behalf of the oil company. We think the testimony establishes the affirmative of the proposition, but whether or not the court so finds, there is no dispute of the fact that the appellee, when he first sought to revive the matter of the sale of the land, was informed and knew that the appellant was acting for the oil company and not for himself. The appellee himself testifies that when he called on the appellant on November 9, 1903, the latter in-

formed him that the land had been bought for the oil company (Rec., 56). And all through the record the evidence, both documentary and verbal, shows that the position of the appellant in regard to the renewed negotiations was that of agent for the company, and that the appellee was so informed. Also that A. W. Thomas, the attorney for the company, was in all these negotiations acting in behalf of company and not for the appellant. It would be an unnecessary waste of time to quote the testimony of the witnesses as to this fact, as the statement of the case refers to pages of the record where such testimony may be found.

The only evidence in writing bearing upon these renewal negotiations is, in substance, as follows:

The next day after appellee visited appellant (November 9), when he was informed that the sale was a company matter, he wrote appellant a letter in which he said:

> "I have consulted two lawyers and am satisfied that I am fully authorized and empowered to complete sale of land and give deed. It rests with you. Please let me know positively on or before Monday next (16th) what you intend to do. There is a proposition on hand from other sources. * * * I will make private arrangements at once for the disposition of it if you do not take it. If you do not meet the requirements and satisfactory arrangements are not made before Monday, the 16th, at 12 o'clock, consider the matter ended" (Rec., 162).

The appellant made no arrangements.

The next written evidence is the letter from appellant to appellee of November 23, 1903, in which the former says that he had received the order of the orphans' court of November 17th; that the agreement was entered into on behalf of the oil company; all parties so understood; is advised by the company that the death of Ball renders further steps to be taken to complete and pass title; that he has no personal interest in the matter and does not assume any personal liability; that the agreement remains to be consummated be-

tween the appellee and the company, adjust the matter with the company (Rec., 164). In reply the appellee said that he knew nothing about the company, but would deal with appellant; that he stated it was his private enterprise (Rec., 164).

The next written evidence is the letter of Thomas, as the company's attorney, to Roberts, the appellee's attorney, dated November 23, 1903, in which he says that he had examined the order of the orphans' court and the will of Ball, and that it does not appear to him that the court had jurisdiction to make the order, or that title can be vested in the purchaser under the agreement or under the will of Ball by means of such order; that the death of Ball has produced complications which necessitate the taking of steps other than those contemplated in the order to furnish a good title to the purchaser. The agreement should stand pending the completion of perfect title. Have so advised the Maryland Oil Company, the real party to the agreement, Dr. Stewart being the nominal party (Rec., 117).

The next written evidence is a letter from Thomas to Ambrose, an attorney of appellee, in which the former sets forth his objections to the title as shown by the abstract furnished him (Rec., 319).

Now, the above is the substance of all the documentary evidence in the record relating to the attempted revival and carrying out of the contract, and we submit that it is not sufficient or competent to bind the appellant for the reasons:

First. That it proves, if anything, that all parties were informed that the oil company, and not the appellant, was the party seeking to purchase the land, and that after such information the appellee continued his negotiations.

Second. That the oral testimony given in connection with the negotiations is not competent or sufficient under the prohibitions of the statute of frauds to prove a contract of purchase of real estate entered into by appellant.

In the case of Dunphy *vs.* Ryon (116 U. S., 491), where the contract for the sale of lands was verbal and a bill filed for specific performance, the court said: "A contract void by statute cannot be enforced directly or indirectly." "It confers no right and creates no obligation as between the parties to it." "The mere breach of a verbal promise for the purchase of lands will not justify the interference of a court of equity." "The party who so refuses stands upon the law and has a right to refuse."

May *vs.* Rice, 101 U. S., 231.

V.

The record shows that the heirs of Alfred W. Ball are indispensable parties to this suit.

This assignment of error involves a consideration of—

A. The effect of the execution of the said contract upon the real estate in question.

B. The respective interests and titles of the heirs of Ball and of the appellee, as executor, in and to the land in question, arising upon the death of Ball.

C. The effect of the alleged probating of the will of Ball upon the right of the heirs to subsequently assert and enforce their claims in the courts against any grantee from the said executor.

A. The appellee contends, and the Court of Appeals, in its opinion, declared the law to be, that "the sale effected a conversion and thereafter Ball held the land as trustee for the defendant; that, upon the execution of the contract, Ball's interest, as represented by the unpaid balance of the purchase price, became personalty or a chose in action and passed to the executor as such."

Is this declaration a correct construction of the effect of the contract of sale upon the title to the land and its character, as being money or land?

It is undoubtedly true that the courts hold that an ordinary, completed contract for sale of real estate, or a positive direction in a will that the real estate of the testator be sold, works a conversion of the real estate into money and vests title to the latter in the executor as against the heirs. But not every contract of sale or every direction to sell in a will works such conversion; and as the doctrine of equitable conversion is purely a creature of courts of equity, such courts are very strict in their requirements as to what the terms of such contracts shall provide in order to change the character of the real estate and divest the heirs of their title to the land.

> "The rule is therefore firmly settled that in order to work a conversion while the property is yet actually unchanged in form, there must be a clear and imperative direction in the will, deed or settlement, or a clear, imperative agreement in the contract to convert the property. If the act of converting is left to the option, discretion or choice of the parties, then no equitable conversion will take place, because no duty to make the change rests upon them."
>
> 3 Pom. Eq. Jur., Sec. 129.

The above is in harmony with the decisions of the courts of Maryland, which decisions must be controlling as far as the contract in the present case is concerned.

In Lynn *vs.* Zephart (27 Md., 547) the court said:

> "The inclination of courts of equity upon this branch of jurisprudence, is not generally to change the quality of the property unless there is some clear intention or act by which a definite character either as money or as land has been unequivocally fixed upon it throughout. If this intention does not clearly appear the property retains its original character."

"Courts of equity will regard the substance and not

> the mere form of the agreement and give to it the precise effect which the parties intended."

As in Kellar *vs.* Harper (64 Md., 74) the court said:

> "In order to work a conversion there must be an imperative and unequivocal direction to sell the real estate. *And when the sale is dependent upon a contingency, there is no transmutation until the contingency happened.* Another important rule is that the courts are averse to sanctioning a change in the quality of an estate, and if there is any doubt as to the intention of the testator the original character of the property will be retained."

And it is further held by the Maryland courts that in the case where the court appoints, by its decree, a trustee to make sale of real estate and the trustee sells the property no conversion takes place until the court ratifies the sale and the purchaser pays the purchase money.

Dalrymple *vs.* Taneyhill, 2 Md. Ch., 125.
Jones *vs.* Plummer, 20 Md., 416.

As in a case where the testator directed his real estate to be sold and the proceeds applied to a special purpose, and that purpose became incapable of taking effect, the court held that no conversion took place and the title to the real estate resulted to the heir at law. "The heir is not to be excluded in favor of the next of kin or the residuary legatee by mere implication or intendment, nothing less than clear, substantive and undeniable intent on the part of the testator will exclude him."

Rizer *vs.* Perry, 58 Md., 112.

Now apply the above principles to the contract in the present case and it must clearly appear that the execution of said contract did not work a conversion of the real estate into personalty. The contract is not imperative, unequivocal and unconditional. Its consummation depended on the happen-

ing of a certain contingency, to wit, the payment of the first half of the purchase money by the appellant, or upon his default, admitting for the purpose of argument, the election of Ball to declare the contract binding and enforce its performance. That he had no intention to so elect is apparent from the terms of his ratification of said contract, wherein he says: "This is with the understanding that if said sale is consummated and one-half the purchase money be paid in cash, that Dr. L. A. Griffith, my agent and attorney shall pay out of his commission one-half of the costs of surveying and attorney's fee—the other half by W. W. Stewart—otherwise I am to pay the costs of surveying and attorney's fee" (Rec., 311). This ratification clearly shows that he understood the contract not only to be not imperative or unconditional, but that it might never be consummated; and in that event that he intended not only to make no election to insist upon the performance of the contract by the appellant, but to relieve him, appellant, from paying one-half the cost of the survey and the attorney's fee. Ball never intended by the ratification of said contract that his land should be converted into money and the character of the title to the land changed. When he died the land was in contemplation of law and in fact real estate; the contingency which would work a conversion had not occurred.

> "Where a conversion of land into money or money into land is directed * * * by an instrument *inter vivos* and the purpose and object for which such conversion was intended fails before the directions for a conversion are carried into effect, the property thus directed to be converted will remain in its original condition; it will result in its original unchanged form to the heirs or to the personal representatives, * * * as the case may be. If land is to be sold and converted into money, the property results as real estate to the heirs."
>
> 3 Pom. Eq. Jur., 138, 141.

Until the appellant had made his first payment under the contract, or, in the event of his default, until Ball had made his election, assuming that he had the right so to do, to enforce the contract there could be no equitable conversion.

3 Pom. Eq. Jur., 132.
30 Beav., 206.
White's Estate, 167 Pa. St., 206.
Edward *vs.* West, 7 Ch. Div., 858.
Smithers *vs.* Loehenstein, 50 Ohio St., 346.

B. The respective interest and title of the heirs of Ball and of the appellee, as executor, in and to the land in question arising upon the death of Ball.

Now whatever title or interest the appellee may have in the land in question must be derived from one of two sources, viz, either from the will of Ball or from the fact that Ball did not own said property as real estate, but owned a mere right of action respecting the same which devolved upon appellee as executor.

As to the first source, the appellee testifies that the real estate referred to in the will of Ball did not include the land in question, but referred exclusively to a farm which Ball had inherited from his brother (Rec., 48). For the purposes of this branch of the argument we will accept that statement.

As to the second source, we know of no law of Maryland that empowers an executor, as such, to deal with the real estate of his testator, except, upon proper showing made to the court and authority therefrom to sell the same, as may be necessary for the payment of debts and legacies, nor is there any law authorizing an executor to carry out and enforce contracts for the sale of land made by his testator, except in the one instance heretofore discussed. But the appellee herein contends that, as Ball at his death had no interest in the land as land, but merely held the legal title as trustee for the appellant, the only estate which he left growing

out of the contract for sale was that of a creditor of appellant to the extent of the amount of the purchase money, and that under the law this estate (being a mere chose in action) devolved upon him and gives him the right to sue for a specific performance without reference to any rights the heirs may have in the premises.

And the Court of Appeals in its opinion assumes a similar position. It says:

> "Under the sale, the land became the property of the defendant (appellant) and the agreed purchase price became the property of Ball. In equity Ball held the land as trustee for defendant, and the defendant held the purchase price as trustee for Ball. * * * Hence the contract, a mere chose in action, passed to plaintiff as executor" (Rec., 403.)

And the court refers to the case of Lewis *vs.* Hawkins, 23 Wall., 119, as sustaining its holding. An examination of the contract in that case will show that in its character, completeness, and freedom from all contingencies it differs entirely from the contract of Ball. There Hawkins purchased certain lands from Lewis and gave him his promissory notes representing the purchase price, and in return Lewis executed a bond for a deed. And in that case this court said:

> "Upon the execution of the notes and the title bond between Lewis and Hawkins, Lewis held the legal title as trustee for Hawkins and Hawkins was a trustee for Lewis as to the purchase money. * * * The securities for the purchase money are personalty and in the event of the death of the vendor go to his personal representative."

This was a very different case from the one at bar. There there was no provision of forfeiture; here there is. There there was no provision that in the event the purchaser should fail to make his payment the contract should become null and void and of no effect in law; here there is. There notes

of the purchaser representing the amount of the purchase price were not only executed, but also, as the statement of facts by the court in its opinion shows, actually given to the vendor, and the latter's bond for conveyance given to the purchaser; here no notes or other instruments representing the purchase price were given, or even executed, to the vendor, and no bond for conveyance was given in return: all was *in futuro*, depending upon the happening of a contingency—either the payment of the first half of the purchase price by the appellant or, as appellee contends, the election by Ball to enforce the contract. There the contract was absolute, complete, and dependent on no contingency; here the contract was contingent, subject to become void by the act of the appellant or of Ball or of both. There are many decisions to the same effect as that in Lewis *vs.* Hawkins, and we are not here contending that they are incorrect, but what we do urge is that they have no application to the facts in this case. The distinction that we contend for has been declared by the courts in other cases.

In Boone *vs.* Chiles (10 Pet., 177) the court said:

> "If the vendor has actually made a conveyance his title is extinguished in law as well as in equity; if he has sold, but has not conveyed, his contract of sale binds him to convey, *unless it be conditional.*"

The true principles of law respecting the respective rights and titles of Ball and the appellant in the subject-matter of this controversy, we submit, were declared by this court in the case of Jennison *vs.* Leonard, 21 Wall., 302. The court there said:

> "This was one of the sales of real estate by contract, so common in this country, in which the title remains in the vendor and the possession passes to the vendee. The legal title remains in the vendor, while an equitable interest vests in the vendee to the extent of the payments made by him. As his payments increase his equitable interest increases, and when the con-

tract price is fully paid, the entire title is equitably vested in him, and he may compel a conveyance of the legal title by the vendor, his heirs or assigns. The vendor is a trustee of the legal title for the vendee to the extent of his payments. The result of this state of things is quite unlike that of a conveyance subject to a condition subsequent which is broken, and when re-entry or a claim of title for condition broken is necessary to enable the vendor to restore to himself the title to the estate. The legal title having in that case passed out of him some measures are necessary to replace it. In the case of a contract like that we are considering no legal title passes. *The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest—as notice, an agreement of the parties, a surrender, an abandonment—places the vendor where he was before the contract was made.*

"No mode of terminating an equitable interest can be more perfect than a voluntary relinquishment by the vendee of all rights under the contract, and a voluntary surrender of the possession to the vendor."

Now, in the case at bar it will be observed that the appellant never had possession of the land. Under the terms of the contract Ball was to retain possession of the premises until the contract should be consummated and the contingency eliminated by the appellant making his first payment. It is neither in consonance with law or reason to hold that because of the mere deposit of $500, which in a certain contingency was to be forfeited to Ball, Ball held the whole legal title in trust for the appellant. Ball's trusteeship, at the most, extended only to appellant's interest of $500, and when that was forfeited the trusteeship wholly ended, and Ball's title became the same as it was before the contract was entered into, a title to the land, as land. And if this land is not included in the will, as the appellee asserts, then it descended to the heirs at law of Ball, and the executor has no interest in the same, and has no right to file his bill for a specific performance of the contract.

Now, if the contract did not become null and void when the appellant defaulted, and if Ball, had he lived, would have the privilege of electing whether he would or not enforce specific performance, all whereof we do not concede, then as the legal title descended to the heirs, they and they alone are the persons entitled to exercise the election. They have the right to be heard on the question as to whether the contract is an existing one, and as to whether the appellee as agent, and he says his agency was terminated by Ball's death, is entitled and shall be paid any commissions for his services in the matter. It is immaterial whether they might or might not be successful in any claims that they might make, yet they are entitled to be heard, to have their day in court.

Now, if the heirs of Ball have no interest in this land as real estate, because it is embraced in the will, nevertheless the appellee is not entitled to maintain this suit for specific performance because the will expressly directs how the executor shall dispose of the real estate; and he is bound to pursue strictly the course therein prescribed. He gets no title to the land except by virtue of the will, and then only such title as is necessary for him to carry out its provisions.

The will provides: "I do hereby further direct, authorize and empower him, the said Lewis A. Griffith, my executor, to sell my real estate of which I may die seized and possessed at the time of my death wherever the said real estate may be situate, at public sale after one month's notice by due publication of said sale and of the time, place, and manner of said sale, the said real estate to be sold upon such terms and conditions as my executor shall deem proper and expedient" (Rec., 13). The will then proceeds to direct the manner in which certain legacies out of the proceeds of sale shall be made, and names a number of the testator's heirs, and further provides that if certain heirs whose whereabouts

are unknown shall appear they shall be admitted to share in the proceeds.

Now, clearly the appellee cannot deal with the real estate in any other method than is provided for by the will, and the bill for specific performance filed by him in this cause is not a method provided.

And, again, assuming that there was a conversion at the date of the contract of sale, and that Ball held the legal title in trust for appellant, and that the purchase money became a part of Ball's personal assets and, upon his death, became vested in appellee, as executor, yet the title to the real estate descended to Ball's heirs, and they are the only persons who could make a valid conveyance of the title to the appellant.

1 Pom. Eq. Jur., sec. 368.

C. The effect of the alleged probating of the will of Ball upon the right of the heirs to subsequently assert and enforce their claims in the courts against any grantee from the said executor.

The appellee claims that the will was duly admitted to probate and he appointed executor thereof by the orphans' court. We have heretofore attempted to show that the whole proceeding before the said court was a nullity and that the court was without jurisdiction in the matter. But, for the purpose of argument, assume that the will was duly admitted to probate and the appellee's appointment as executor valid, then what effect do such proceedings have on the rights of the heirs? When Ball died all his property descended to his heirs and continued vested in them until the will was probated. Without such probate they would now be the holders of the legal title to the estate; and as the effect of the will and its probating was to divest them of their title, before such divestiture can legally take place they have a right to their day in court. The Maryland Code, to which we have

heretofore called attention, expressly provides for the saving and enjoyment of such right of the heirs.

The Maryland courts, in many cases, have declared the effect of the probate of a will upon the rights of heirs.

In the case of Johns *vs.* Hodges (62 Md., 525, 537), it was decided that probate of a will is only *prima facie* evidence of such will so far as it concerns real estate. The court said:

> "However conducive to public and private convenience it would have been to make the probate proceedings conclusive for all purposes, the legislature has not seen fit to make them so, but has made the exception noted. * * * In effect we think the saving by implication declares that without probate the will shall *not* be *prima facie*. But inasmuch as probate may have been improperly secured, the heirs, who, in natural order but for the will would have succeeded to the title and possession, shall not be precluded from attacking the probated will."

In Clagett *vs.* Hawkins (11 Md., 381) it was held that not even an express satisfaction of the genuineness of the will and acceptance of legacies thereunder will bar a contest if the probate was without contest.

And in Levy *vs.* Levy (28 Md., 25) that any person interested may file a petition contesting the validity of the will.

O'Neal *vs.* Smith, 33 Md., 574.

And in the case of McArthur *vs.* Smith (113 U. S., 340), where a will was probated and the probate afterwards set aside without making some of the persons who took under the will parties to the proceedings to set aside the probate, upon a bill filed by such persons to enforce their rights under the will, the court held that the proceedings were not binding upon them, and said: "All persons interested in a suit in equity and whose rights will be directly affected by the decree must be made parties to the suit unless they are too numerous or out of the jurisdiction of the court, but the decree must be without prejudice to the rights of those who

are not made parties and who do not come in before decree."

And if persons cannot be reached by process the bill must be dismissed.

Ribon *vs.* R. R. Co., 16 Wall., 446.
Gregory *vs.* Stetson, 133 U. S., 579.

In the case of Shields *vs.* Barlow (17 How., 130) it was held that persons having rights which must be affected cannot be dispensed with. And the court said: "In Morgan's Heirs *vs.* Morgan, 2 Wheat., 290, a bill was brought by the heirs of a deceased vendor to compel the specific performance of a contract to purchase lands. It was objected that the deceased had a child who was not made a party. Chief Justice Marshall said: "It is unquestionable that all coheirs of the deceased ought to be made parties to the suit either plaintiff or defendant, and a specific performance ought not to be decreed until they shall all be before the court."

We therefore submit that the heirs of Ball are indispensable parties to this suit, because:

First. There was no conversion of the land and the heirs hold the legal title, and the appellee, as executor merely, has no interest or title in the land.

Second. If the land passed under the will of Ball, or even if the interest of Ball became a mere chose in action in the custody of the appellee, who is entitled to enforce the same, yet the heirs are necessary parties; because the probate of the will is only *prima facie* evidence of its validity, and it may be attacked at any time by the heirs, and the appellant as grantee of the appellee will be subject to attack by the heirs, and his title, unless the heirs are made parties, will at the most be a mere *prima facie* title.

Third. Even if there was a conversion, yet Ball held the legal title, and that title descended to his heirs, and they are

the only persons who can make a valid conveyance of the title to the land.

VI.

The record shows that the deed alleged to have been tendered the appellant does not convey a good, fee-simple title to the land involved free from all liens and encumbrances.

A copy of the deed alleged to have been tendered the appellant is found on page 25 of the record. This deed names as grantor Dr. Lewis A. Griffith, of Prince George's County, Maryland, executor of Alfred W. Ball. It then recites the power of attorney from Ball to appellee, authorizing him to negotiate the sale of the land in question, and that appellee did negotiate the sale of same with appellant, and executed the contract of sale of June 5, 1903; that the completion of the said agreement of sale was to be carried out on November 7, but Ball died on November 6; that Ball had in the meantime executed his last will, in which he appointed the grantor executor thereof, and that the latter has duly probated said will; that said grantor, as executor, did, on November 17, 1903, file his petition in the orphans' court of Prince George's County, in which he recited the sale by him as attorney for Ball; that Ball died leaving a last will, in which grantor was named as executor, without having conveyed the said property to Stewart, and asking the court to pass an order authorizing him as executor to execute, acknowledge and deliver a deed for the property to said Stewart; that the court on the 17th of November, 1903, passed its order authorizing the executor to convey the said property upon the payment of the residue of the unpaid installment of the purchase money as agreed upon in said agreement; and whereas the said grantor, for the purpose of complying with and carrying out the said order of the said orphans' court in the premises, is willing to execute this indenture: Now this indenture witnesseth that the said

Griffith as executor, for and in consideration of the premises as aforesaid, and the further consideration of the payment to him of the purchase money for said land, doth grant, etc.

The heirs of Ball do not unite in this deed.

Now the sole authority for the appellee to make this deed as recited therein is the order passed by the orphans' court. The deed recites that the order was passed on November 17, while the record shows that it was passed on December 15, 1903.

This order was a mere nullity and could give the grantor in the deed no authority to make the conveyance, and as the deed recites that the same was made for the purpose of carrying out the order of the court, it was not a valid deed and could pass no title, and the tender of the deed was not a good, sufficient tender.

Besides, as we have shown, the grantor had no title to the property which he could convey. The heirs were necessary parties to the conveyance. If the land be held to be embraced in the will of Ball, and the executor thereby became vested with authority to sell and convey the land, he must pursue the course prescribed by the will. In no other way could he dispose of the land, and no court could authorize him to make sale and conveyance in any other manner.

We submit that no tender of a valid deed was made to the appellee.

VII.

The case made by the record is not of that completeness as to justify the court in decreeing specific performance of the alleged contract.

The said contract provides that the grantor "*agrees to convey by proper deed or deeds of conveyance in fee simple free and clear of all liens and encumbrances of every kind and nature*" (Rec., 231).

The appellee contends that the title he offers to convey to

appellant complies with these requirements of the contract. The appellant contends, among other things, that the appellee is not able to pass such a title because the appellee executor, as such, has no title to the land. Under the will, if the land in dispute be embraced therein, the appellee, as executor, is not expressly vested with any title to the land, but is given only a power to sell and convey the land in a certain manner, which power he has not exercised in this proceeding, and does not claim that he instituted this suit by virtue of said power. Upon Ball's death his heirs became vested with the title to his estate, and have never been divested thereof; the alleged will of Ball never was legally probated, because the record shows that the orphans' court never had jurisdiction of the matter, and until the will became legally probated the court had no power to appoint an executor thereof. Admitting that the will was legally probated, yet the proceedings were solely *ex parte,* without contest or notice to or the appearance of the heirs, and the probate is merely *prima facie* evidence of the validity of the will. The validity of the will, the legality of the probate proceedings, the right of the executor to enforce the contract of sale and the legality of any deed that the executor may make are all subject to the attack of the heirs, any or all of them, in the courts. If the court should decree specific performance and this appellant be compelled to take a deed from the appellee such deed and the title of the appellant thereunder would be liable to as many suits to determine the validity of the title as there are heirs.

These contentions being facts can the appellee convey such title to the land as the contract calls for?

In the case of Adams *vs.* Henderson (168 U. S., 573, 580-1) the issue was whether the purchaser under a contract for sale of real estate was bound to accept a deed tendered by the vendor, the purchaser claiming that the vendor could not convey the title stipulated for in the contract. The seller's title was encumbered with the right of a railroad company

to pass over and across the land for the purpose of prospecting for and mining minerals other than coal. The sellers contended that it cannot be assumed, in the absence of proof, that the purchaser would likely be disturbed in the full and complete enjoyment of the land for every purpose for which it is adapted. The court held that the purchaser was not bound to accept the deed and said:

> "A good and indefeasible title in fee imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it as against all others. * * * The plaintiffs in effect ask that, instead of a good and indefeasible title in fee simple, the defendants shall take and pay for land encumbered. * * * A court of equity could not compel the defendants to take and pay for land thus encumbered without making for the parties a contract which they did not choose to make for themselves. * * * What the defendants are entitled to is a marketable title—a good and indefeasible title in fee; but that they will not obtain if forced to take the land subject to the railroad company's right of way over it."

In the case of Gill *vs.* Wells (59 Md., 491, 493-5), which was a suit for specific performance of a contract of sale brought by a vendor, who had purchased the land from a trustee appointed by the court and directed to make sale, which was made and the same approved, against the purchaser, a minor daughter inherited the land which was subject to her mother's dower right. The mother, as guardian, petitioned the court to authorize a sale of the land, and the court ordered the land to be sold. A deed was given by the court's trustee to the purchaser under this sale who went into possession. The defendant in the suit refused to accept a conveyance claiming that the order of the court and the sale thereunder to the plaintiff were void; the court so held and denied specific performance, because the law did not empower the court to authorize the sale of the ward's estate;

and declared the title still in the ward, and that a deed from her was necessary to perfect the title. The court said:

> "The vendee is entitled to have that for which he contracts, before he can be compelled to part with the consideration he agreed to pay. He is not bound to take an estate fettered with encumbrances, by which he may be subjected to litigation to procure his title; and in a contract such as is sought to be enforced in this case, the vendee is not bound to accept anything short of an unencumbered legal estate in fee, the title to which is free from reasonable doubt. * * * The decree of the court * * * binds only those who are parties to the suit, and those claiming under them, and in no other way decides the question in issue as against the rest of the world. * * * If, therefore, there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the court considers this to be a circumstance which renders the bargain a hard one for the purchaser, and one which in the exercise of its discretion it will not compel him to execute. * * * Every purchaser of land has a right to demand a title which shall put him in all reasonable security, and which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him, and probably take from him or his representatives land upon which money was invested. He should have a title which shall enable him not only to hold the land, but to hold it in peace; and if he wishes to sell it to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."

And, in the case of Wesley *vs.* Eells (117 U. S., 376, 376, 377) this court held in effect as follows:

> A defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist, or which may expose him to litigation. Specific performance will be denied when it would impose upon the defendant the necessity of bringing

suit to perfect his title. It is not necessary that he should satisfy the court that he ought to prevail at law in any suit affecting the title; it is enough if the title appears to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title or rights incident to it. He ought not to be subjected to the necessity of litigation to remove even that which is only a cloud upon his title. Courts of equity do not force the purchaser to take anything but a good title, and do not compel him to buy law suits.

Watts *vs.* Waddell, 6 Peters, 389.
Dundas *vs.* Auld, 5 Cranch, 262.
Emmert *vs.* Stauffer, 64 Md., 543.
McCaffrey *vs.* Little, 20 App. D. C., 116.
Railroad Co. *vs.* Winslow, 18 App. D. C., 453.

These principles, controlling courts of equity, are especially applicable to the case at bar, because the Supreme Court of the District has no jurisdiction over the land, and its decree cannot affect the title to the land or operate as a conveyance thereof. And the courts of Maryland would not recognize such decree as binding upon them or upon any parties who may have an interest in the land. Such decree can operate only *in personam*, and no one not a party to the suit can be in any way bound by it. Ball's heirs would not be estopped by it from asserting their claims, and in a suit by them against the appellant, either at law or equity, such decree could not be pleaded as an estoppel or otherwise, and would not even be admissible in evidence.

Corbett *vs.* Nutt, 10 Wall., 464.
Hart *vs.* Sansom, 110 U. S., 151.
Carpenter *vs.* Strange, 141 U. S., 87.

And, finally, we submit that if the right of the heirs of Ball to attack the validity of the will and, consequently, the title of the executor and his right to make a conveyance were the only question in the case, it would be sufficient to deter this court from decreeing specific performance of the contract against the appellant.

Conclusion.

From these considerations it thus appears that the record presents the following insuperable objections to the right of the appellee to have specific performance of the contract under consideration, and consequent error in the decree of the Court of Appeals of the District of Columbia granting the same, namely:

1. The contract itself was, by its own terms, either self-terminable by reason of failure of compliance on November 7, 1903, with the provision then to be complied with, or it was a contract optional with the vendor and terminable by him or his legal successor in title after the passing of that day without compliance with such provision.

a. That it was self-terminable, and therefore terminated on the day mentioned, is shown by its terms (*ante,* 29-33), and by the conduct of the parties, particularly that of the appellee (assuming to be the vendor's successor in title), who treated the contract as terminated and endeavored to make a new contract with the appellant in the premises (*ante,* 33-36), having notice at the time that the appellant was claiming to be acting in the transaction for the oil company, and not for himself individually.

b. If optional, it was terminated on November 16, 1903, by the act of the appellee (assuming to be the vendor's legal successor in title), in notifying the appellant that, unless complied with by that day, it would then be terminated; and it was not complied with on that day or any day thereafter, and was, therefore, extinct before the bringing of this suit (*ante,* 36-40).

2. The contract and the conduct of the parties thereunder—"the sale" (as the Court of Appeals characterizes it)—in fact did not operate a conversion, because the failure of (1) the making cash payment; (2) delivery, or even

execution, of the notes for the deferred payments, and (3) execution of the mortgage to secure the said notes, left undone the three things provided by the contract to be done by the vendee, each of which alone, and *a fortiori* all of them together, left the situation without that which is indispensable to conversion, namely, the doing by the parties of what was contemplated to be done so as to cause them in fact and in law to change places in relationship to title to the real estate, on the one hand, and the money to be paid for it, on the other: in other words: the consummation of the contract as to everything, except the actual exchange of what each party was to give to the other—on the part of the vendor, title to the land, and, on the part of the vendee, the consideration therefor.

3. Whether the contract and the conduct of the parties under it—"the sale"—operated a conversion, as held by the Court of Appeals, is immaterial, as,

a. The appellee (assuming to be the vendor's legal successor in title), neither by any conduct before bringing his suit nor that in bringing the same, treated the contract as operating a conversion;

b. The very suit itself, which is for specific performance, is a proclamation by the appellee of non-compliance by the appellant with the terms of the contract, of which the three essentials on his part were (1) making the cash payment; (2) the passing of his notes for the deferred payment; and (3) the execution by him of a mortgage to secure the said notes; and, accordingly, a proclamation that there was no conversion in the premises.

c. If there were a conversion, a suit against the appellant for specific performance would have to be brought by the heirs, the vendor's legal successors in title, unless the vendor, by will, vested his executor with appropriate title; which is not here the case, inasmuch as the only vesting of the executor with title to the vendor's real estate is derivative from the

authority to sell, given him by the will in that behalf, and which empowers him only to make a sale of any portion of the vendor's real estate, (1) after the vendor's death; (2) at public, and not at private, sale; and (3) after one month's notice by publication.

4. The action of the appellee in procuring the orders of the orphans' court of November 17 and December 15, 1903, and basing this suit thereon (*ante*, 24-28), negatives both (1) the idea that he could claim the purchase money of the appellant as though there had been a conversion in the premises; and (2) the idea that the contract was the subject of a suit for specific performance; because,

a. If in fact there had been a conversion claimed by the appellee, he should and would have sued the appellant at law for the purchase money; and,

b. His procuring the orders in question was upon the distinct assumption, jurisdictional in the court making those orders, that the contract had in fact been performed by the appellant, and that there remained only to complete its performance—in the language of the vendor in his act of ratification, its "consummation"—on the part of the vendor, the conveyance of title.

5. The suit being based upon the said orders of the orphans' court, the appellee's right to maintain the same is conclusively negatived by the want of jurisdiction in that court to make those orders, by reason of the non-existence of the sole condition in respect of which that court had jurisdiction, namely, the actual payment by the appellant of the purchase money, and the remaining to be done for consummation of the transaction only the passing of title to the land: wherefore, both the said orders and everything done thereunder by the appellee are in law both void and futile.

6. The suit being *in personam*, and any decree therein not binding upon the courts of Maryland with respect to the

question of title to the land, and that title depending upon the law of Maryland, as contained in its legislation and declared by its courts, there is manifestly, on the face of the matter, such reasonable chance that third persons, namely, the heirs of the vendor or their assignees, might raise questions, grave in character, against the appellant after completion of the contract, even through the medium of specific performance, and might bring annoying, if not successful, suits against him and probably take from him or his representatives, land in which his money would have been invested; and it being manifest that the title which the appellant would derive through a decree in the premises would not enable him to hold the land in peace, or enable him, if he should wish to sell it, to be reasonably sure that no flaw or doubt would come up to disturb its marketable value: the title tendered the appellant by the appellee, and assumed to be forced upon the appellant by the court below, is not of the character that a court of equity should or could compel the appellant to take (*ante* 54, 57).

7. The character of the appellee as executor of the vendor being challenged, and proof of his due appointment and qualification as such being exacted in the outset, and it abundantly appearing that such challenge has not been met, nor such proof produced (*ante*, 17-24), the appellee has not established his right to bring this suit.

Respectfully submitted.

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